RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., *ET AL.*, *Petitioners*,
v.
COLORADO CIVIL RIGHTS COMMISSION, *ET AL.*,
Respondents.

On Writ of Certiorari
to the Court of Appeals of Colorado

Brief *Amicus Curiae* of Public Advocate of the United States, U.S. Justice Foundation, Citizens United Foundation, Citizens United, One Nation Under God Foundation, Conservative Legal Defense and Education Fund, and Constitution Party National Committee in Support of Petitioners

JOSEPH W. MILLER
Ramona, CA
Attorney for Amicus Curiae
U.S. Justice Foundation

MICHAEL BOOS
Washington, DC
Attorney for Amici Curiae
Citizens United and
Citizens United Found.

JAMES N. CLYMER
Lancaster, PA
Attorney for Amicus Curiae
CLDEF

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
ROBERT J. OLSON
William J. Olson, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
September 7, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 2

SUMMARY OF ARGUMENT 7

ARGUMENT

1. THE COLORADO LAW EXCEEDS THE POWER OF CIVIL GOVERNMENT, WHILE VIOLATING THE PEOPLE'S INALIENABLE RIGHTS 10

   A. This Case Is Not Just About State Compulsion of "Artists" 11

   B. This Case Is Not Just About a State Banning Discrimination Based on Sexual Orientation 12

   C. The Colorado Commission's Move against Christian Businesses Who Decline to Participate in Judicially Imposed Same-Sex Weddings Was Entirely Predictable 14

   D. The Colorado Commission Operates in a Highly Politicized Environment 18

   E. CADA Seeks to Implement an Irreligious Totalitarian Agenda under the Guise of Secularism 20

F. There Must Be No Special Rules for First Amendment Cases involving Same-Sex Marriage 22

G. CADA Is Based upon a Perversion of the Common Law Doctrine of Public Accommodations 25

H. The Thirteenth Amendment Prohibits Not Just Slavery, but also Involuntary Servitude 29

II. THE COURT OF APPEALS' DECISION VIOLATES MASTERPIECE'S AND PHILLIPS' FREE EXERCISE OF RELIGION 31

A. Masterpiece's Free Exercise Claim Is not Foreclosed by a Finding that CADA Is a Neutral Law of General Applicability . . . 31

B. Religion Is a Jurisdictional Term Prohibiting the State from Regulating Activities that Belong to the Church 33

C. The State Is not Free to Regulate Proselytizing 35

D. A Wedding Ceremony Is a Proselytizing Event Outside the Jurisdiction of the State. 36

III. THE COURT OF APPEALS' DECISION ERRONEOUSLY APPLIED THE SUPREME COURT'S "COMPELLED" SPEECH DOCTRINE . . . 38

CONCLUSION 39

TABLE OF AUTHORITIES

Page

HOLY BIBLE
Acts 5:29 16
Romans 1:24-32 18
I Corinthians 12:1-26 12
Ephesians 2:1-3 18

U.S. CONSTITUTION
Amendment I . . . . . 7, *passim*
Amendment XIII 29, 30, 31

STATUTE
42 U.S.C. § 2000a 26
Americans with Disabilities Act 34
Civil Rights Act of 1964 26
Colorado Anti-Discrimination Act . . . . . 7, *passim*
C.R.S. 24-34-306 19
C.R.S. 24-34-307 19
C.R.S. 24-34-601 26
C.R.S. 24.2-34-602 20

CASES
Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) 36
Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 32
Civil Rights Cases, 109 U.S. 3 (1883) 29, 30
District of Columbia v. Heller, 554 U.S. 570 (2008) 32
Elane Photography, LLC v. Willock, 134 S.Ct. 1787 (2014) 4

Emp't Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990) . . . . . 9, *passim*
Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 40
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 30
Hosanna Tabor Lutheran Church v. EEOC, 565 U.S. 171 (2012) 9, 34, 35
Lamb's Chapel v. Central Moriches Union Free School Dist., 508 U.S. 384 (1993) 39
Lawrence v. Texas, 539 U.S. 558 (2003) 23
Marbury v. Madison, 5 U.S. 137 (1803) 32, 33
Obergefell v. Hodges, 135 S.Ct. 2584 (2015) . . . . . 2, *passim*
Reynolds v. United States, 98 U.S. 145 (1878) 33, 34
Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) 39
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MISCELLANEOUS

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J. Bering, "Animal Lovers: Zoophiles Make Scientists Rethink Human Sexuality," *Scientific American*, Mar. 24, 2010 13
J. Mark Brewer, "Refusing to Bow at the Altar of Homosexuality," cnsnews.com (June 15, 2015) 15

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L. Ryken, Redeeming the Time: A Christian Approach to Work & Leisure (Baker Books: 1995) 12
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J. Ware, "Zoophiles protest against German bestiality ban," *The Local De*, Feb. 1, 2013 . . 13
B. Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 HARV. L. REV. 136 (1903) 28
S. Zaimov, "Christian Photographer Can't Be Forced to Work Gay Weddings, Wis. Court Rules," *The Christian Post* (Aug. 25, 2017) . . . 5

INTEREST OF THE *AMICI CURIAE*[1]

Public Advocate of the United States and Citizens United are nonprofit social welfare organizations, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). United States Justice Foundation, Citizens United Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3). The Constitution Party National Committee is a national political party.

These legal and policy educational organizations were established, *inter alia*, for purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on the proper construction of state and federal constitutions and statutes related to human and civil rights. Some of these *amici* also filed an *amicus curiae* brief in this case in the Supreme Court of Colorado in support of a petition for certiorari:

- Masterpiece Cakeshop v. Colorado Civil Rights Commission, Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.*, Colorado Supreme Court (October 23, 2015).

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Additionally, some of these *amici* filed *amicus curiae* briefs in two cases involving related issues:

- Stormans v. Wiesman, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court, No. 15-862 (February 5, 2016).

- Obergefell v. Hodges, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court, Nos. 14-556, 14-562, 14-571, and 14-574 (April 3, 2015).

STATEMENT

In 2015, Chief Justice Roberts accused a bare majority of sitting justices of having employed the "blunt instrument[]" of raw judicial power to create an extra-constitutional right to same-sex marriage. Obergefell v. Hodges, 135 S.Ct. 2584, 2625 (2015) (Roberts, C.J., dissenting). Demurring, the majority promised that:

> those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. [*Id.* at 2607.]

This case calls this Court to make good on that promise. Misusing the Obergefell decision, the Colorado Civil Rights Commission has run roughshod over the rights of Coloradans, applying the Colorado Anti-Discrimination Act ("CADA") to compel a Christian baker to render services in celebration of a same-sex wedding.

Should this Court uphold the constitutionality of CADA, Chief Justice Robert's prophecy would be a much better barometer of the anticipated fallout from Obergefell:

> Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage — when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage. There is little doubt that these and similar questions will soon be before this Court. Unfortunately, **people of faith can take no comfort in the treatment they receive from the majority today**. [*Id.* at 2625-26 (Roberts, C.J., dissenting) (emphasis added) (citations omitted).]

The threat to the Christian cakemaker in this case is nothing less than another effort in a nationwide LGBT-led, relentless campaign to use government power to coerce individuals and businesses to facilitate, participate in, and celebrate same-sex marriage. Christian-based florists and photographers have been among the early targets. Thus far, LGBT forces often have prevailed in their campaign to manipulate various state "public accommodation" and "human rights" laws to force individuals and businesses that oppose same-sex marriage to provide goods and services for those events.

- On August 22, 2013, even before the Obergefell decision, the Supreme Court of New Mexico ruled that a New Mexico human rights law required a wedding photography company (**Elane Photography, LLC**) to provide services for a same-sex wedding. On April 7, 2014, this Court denied review of the case.[2]

- On April 25, 2016, an Oregon cakemaker (**Sweet Cakes/Klein**) appealed an order by a state agency to pay a lesbian couple $135,000 for "suffering" associated with the cakemaker's refusal to bake a cake commemorating a same-sex marriage. That appeal is pending in the Oregon Court of Appeals.[3]

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[2] Elane Photography, LLC v. Willock, 134 S.Ct. 1787 (2014).

[3] G. Rede, "Sweet Cakes: State orders Oregon bakery owners to pay $135,000 for denying service to same-sex couple," The Oregonian (July 2, 2016) http://www.oregonlive.com/business/

- As part of a California court-approved settlement, a Christian dating site (**ChristianMingle.com**) was forced to let gays and lesbians search for same-sex matches on its website.[4]

- Currently pending before this Court on a petition for certiorari is a case concerning a florist (**Arlene's Flowers**) in Washington state who declined to provide floral arrangements for a same-sex wedding because of her "relationship with Jesus Christ."[5] The Washington Supreme Court ruled against the florist, rejecting her free speech and free exercise rights.

- Recently, a state court ruled in favor of a wedding photographer (**Amy Lawson**) in Madison, Wisconsin, and determined that Wisconsin's public accommodations law did not apply to her refusal to photograph same-sex weddings — but only because the photographer did not have a physical storefront.[6]

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index.ssf/2015/07/sweet_cakes_state_orders_orego.html.

[4] *See* http://blogs.wsj.com/law/2016/06/30/christianmingle-com-opens-doors-to-gay-singles-under-settlement/.

[5] Arlene's Flowers v. Washington (No. 17-108), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-108.html.

[6] *See* S. Zaimov, "Christian Photographer Can't Be Forced to Work Gay Weddings, Wis. Court Rules," The Christian Post (Aug.

Is this the future for Christian-based businesses in America — operating underground as if they were black marketers, forced to hide from governments that were designed to secure their God-given rights?

The current climate is not promising. Indeed, the coercive approach of those who highly value sexual license extends even beyond same-sex marriage. On June 29, 2016, in a similar type of case, but one involving abortifacients, this Court denied a petition of certiorari to review the case of a Christian pharmacist (**Stormans**) who was ordered by Washington State officials to carry abortifacients.[7] A dissent filed by Justice Alito, joined by Chief Justice Roberts and Justice Thomas from the denial of certiorari in Stormans v. Weisman, began with these words — "This case is an ominous sign." — and continued[8]:

> There are strong **reasons to doubt** whether the regulations were adopted for—or that they actually serve — **any legitimate purpose**. And there is much evidence that the impetus for the adoption of the regulations was

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25, 2017), http://www.christianpost.com/news/christian-photographer-cant-be-forced-to-work-gay-weddings-wis-court-rules-196832/.

[7] Some of these *amici* filed an *amicus* brief in support of the petition for certiorari in Stormans v. Wiesman, No. 15-682. http://lawandfreedom.com/wordpress/wp-content/uploads/2016/02/Stormans-Public-Advocate-amicus-brief.pdf (Feb. 5, 2016).

[8] *See* https://www.supremecourt.gov/opinions/15pdf/15-862_2c8f.pdf (June 26, 2016).

> hostility to pharmacists whose religious beliefs regarding abortion and contraception are out of step with prevailing opinion in the State. Yet the Ninth Circuit held that the regulations do not violate the First Amendment.... If this is a sign of how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern. [*Id.*]

The circumstances presented in this case are precisely the same.

SUMMARY OF ARGUMENT

Although Petitioner Phillips is a "cake artist" and seeks First Amendment protection for his craft, neither the CADA nor this case is limited to businesses that sell artistic services. The First Amendment rights of almost all other businesses in Colorado are at potential risk from CADA and the Commission's entry of its order against Masterpiece Cakeshop. In addition to the First Amendment's protection of artistic expression, several other general legal principles are violated by the injunctive and remedial order of the Commission.

CADA was adopted as a law governing "public accommodations," but it finds no support in the common law doctrine of public accommodations. That doctrine was borne of the necessity of protecting travelers from robbers along roadways in the night, where no alternatives existed. None of the reasons for the development of that doctrine apply here. It has

always been understood that private businesses may choose with whom they may contract, with the narrow exception of places of public accommodation and common callings. CADA twists this narrow exception into a general rule.

Even CADA's term "sexual orientation" is problematic, as it reflects an entirely subjective and fluid concept, which could be said to apply to virtually any type of sexual attraction, however bizarre. And the record demonstrates that Masterpiece Cakeshop did not discriminate against the complainants based on their sexual orientation, as it was willing to sell its other products, only refusing to bake a cake to participate in and facilitate the celebration of a same-sex wedding, viewed to be immoral.

This case does not involve a persecuted and vulnerable same-sex couple oppressed by a Christian businessman. Indeed, it is better understood as a Christian businessman being targeted for state harassment for no reason other than his moral and religious views. Same-sex couples have myriad alternatives, and a decision to put a Christian business to the burden of defending himself in an administrative proceeding financed by tax dollars is abusive and destructive of small business and religious liberty. Such laws are an indicia of a totalitarian state, where the state will not allow individuals to be left alone, but must be brought to conform. Indeed, the imposition of a requirement to provide personal services upon demand has all the earmarks of "involuntary servitude" prohibited by the Thirteenth Amendment. Moreover, in the case of CADA, reins of

power over the administrative machinery are held firmly by a Governor who is an ardent fan of homosexual rights.

In applying the Free Exercise Clause, both the Smith and Hosanna-Tabor decisions have revitalized and made clear that that Clause's jurisdictional principle requires the Court first to determine whether the subject matter of the law is outside the jurisdiction of the state. This case fails that test, as CADA requires involuntary participation in the celebration of a wedding, and the formation of a marriage, which this Court in Obergefell made clear was a public, spiritual, and proselytizing event. The Court of Appeals' determination that CADA was a neutral law of general applicability is irrelevant and does not resolve the jurisdictional issue.

The Court of Appeals' view that there was no compelled speech because a wedding cake is not "inherently expressive," and that its speculation that a "reasonable observer" would not see providing a wedding cake as an endorsement, badly misses the mark. Rather, the issue is whether the law in question employs viewpoint discrimination for once that is established, as here, the court has a duty to strike down the law as a *per se* violation of the First Amendment.

Lastly, a storm is brewing in the body politic.[9] The aggressors are those seeking to force a new, anti-Biblical morality on the nation, employing the coercive powers of government to compel individuals in a wide variety of businesses to participate in practices known for thousands of years to be sinful. The question now is whether this Court will disregard well-established legal principles in order to throw to the wolves those who continue to embrace Biblical values and teachings.

ARGUMENT

I. THE COLORADO LAW EXCEEDS THE POWER OF CIVIL GOVERNMENT, WHILE VIOLATING THE PEOPLE'S INALIENABLE RIGHTS.

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[9] The Christian community is arising from its slumber to defend the faith, as evidenced by the "Nashville Statement" signed by a large number of Church leaders, which asserts the truth that marriage being a God-designed institution of one man and one woman, and denying "that God has designed marriage to be a homosexual, polygamous, or polyamorous relationship." Addressing the threat posed by cases such as this, and the "secular spirit of our age" they represent, it challenges Christians: "Will the church of the Lord Jesus Christ lose her biblical conviction, clarity, and courage, and blend into the spirit of the age? Or will she hold fast to the word of life, draw courage from Jesus, and unashamedly proclaim his way as the way of life? Will she maintain her clear, counter-cultural witness in a world that seems bent on ruin."

A. This Case Is Not Just About State Compulsion of "Artists."

Petitioner Phillips is a "cake artist" who engages in "several fine-art skills such as sketching, sculpting, and painting." Pet. Br. at 5. Because of his status as an artist, he argues, he is entitled to First Amendment protections. For example, his Brief asserts "Phillips is as shielded by the Free Speech Clause as a modern painter or sculptor, and his greatest masterpieces — his custom wedding cakes — are ... worthy of constitutional protection...." Pet. Br. at 20. To support this claim, Petitioner has marshaled numerous cases in which courts have protected "artistic expression" from state regulation. Pet. Br. at 16-23. These *amici* concur with the accuracy of Petitioner's description of his profession and the First Amendment protections it should enjoy. However, the Colorado Anti-Discrimination Act controls the business practices of not just artists, but virtually all businesses, trades, occupations, and vocations — all methods of making a living — in virtually all of their business dealings.

Planning a wedding involves not only a wedding cake, but also the purchase of numerous types of goods and services from several different types of businesses. These may include buying a wedding dress, renting tables and chairs, hiring a photographer or videographer, hiring a DJ or renting a sound system, ordering flowers, outfitting the wedding party with formal wear, renting a limousine, and even arranging for portable toilets. Although some of the individuals offering these services may make claim to being "artists" (*e.g.*, photographers), others are people just

trying to make a living by offering equally important, albeit generally less creative products (*e.g.*, porta potties). Despite the manner in which this case is being argued by Petitioners, it must be understood that not just the artist, but every business owner, deserves this Court's protections from Colorado's abusive and intrusive law that restricts the ministry of their work.[10]

B. This Case Is Not Just About a State Banning Discrimination Based on Sexual Orientation.

It should be understood that CADA goes well beyond long-established laws governing public accommodation, such as Title II of the 1964 Civil Rights Act, in that CADA bans discriminatory practices based on "sex" and "sexual orientation" not covered by Title II. Prohibiting discrimination based on "sexual orientation" is particularly difficult, as that term is expansive and has a meaning which is both subjective and transitory. Early on, "sexual orientation" was delineated into **heterosexual** (straight) and **homosexual** (gay/lesbian). To that has

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[10] "[T]he Bible supports the idea that ordinary occupations ... are something to which God calls people.... [T]here are farmers, housewives, hunters, soldiers, kings, chariot drivers, and dye makers. God's providence and endowment of people with aptitudes, moreover, leads people into one or another of these.... If God calls us to work, then to do the work is to obey God. [W]ork becomes a service, a means of glorifying God." L. Ryken, Redeeming the Time: A Christian Approach to Work & Leisure (Baker Books: 1995) at 194-95, 197. *See also* 1 Corinthians 12:1-26.

been added "bisexual" (attracted to both men and women), "**pansexual**" or "omnisexual" (attraction to all genders), and "**asexual**" (not sexually attracted to anyone or anything).[11] Indeed, some academics and activists today assert that "**zoophilia**"[12] (sexual attraction towards animals) and "**pedophilia**"[13] (sexual attraction towards children) are legitimate sexual orientations, reminiscent of the pederasty of ancient Greece. Large interest groups have formed around this ever-changing sexual nomenclature.[14] Ignoring this inherent definitional problem, the Colorado statute prohibits "discrimination" based on "sexual orientation" — irrespective of how bizarre that sexual orientation may be.

As demonstrated by the case against Masterpiece Cakeshop, CADA bars discrimination not limited to sexual orientation as such. The record in this case demonstrates that Masterpiece Cakeshop was entirely willing to sell its products to homosexual complainants, evidencing that it did not discriminate

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[11] "Bisexual / Pansexual Identities," LGBT Center, UNC Chapel-Hill, http://goo.gl/DVlvUg.

[12] J. Bering, "Animal Lovers: Zoophiles Make Scientists Rethink Human Sexuality," *Scientific American*, Mar. 24, 2010, http://goo.gl/jt2e0H.

[13] "Many Experts Now View Pedophilia as a Sexual Orientation," *Los Angeles Times*, Jan. 16, 2013, http://goo.gl/cvBT8r.

[14] *See, e.g.*, J. Ware, "Zoophiles protest against German bestiality ban," *The Local De*, Feb. 1, 2013, http://www.thelocal.de/20130201/47711.

based on the "sexual orientation" of a customer. *See* Pet. Br. at 7-10. However, Masterpiece Cakeshop drew the line when it was asked by the homosexual complainants to assist in the celebration of their same-sex wedding. Thus, the Commission applied CADA not just to prohibit discrimination based on the sexual orientation of customers (which was not present in this case) but also to compel a business owner to furnish services to facilitate whatever homosexual complainants might choose to do that is related to their homosexuality — here, having a wedding.[15]

C. The Colorado Commission's Move against Christian Businesses Who Decline to Participate in Judicially Imposed Same-Sex Weddings Was Entirely Predictable.

The current effort by some states not to just crush opposition to same-sex marriage, but to make those who oppose it participate in it, facilitate it, and become complicit in it, was foreseen at the time that this Court imposed same-sex marriage on the nation. For example, while the Obergefell case was pending in this Court, one Houston lawyer, a former JAG officer, keenly observed:

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[15] By way of illustration, consider a couple barely of the minimum age to marry, who exhibit immaturity and unpreparedness to marry when they enter the bakery. They ask the baker to prepare them a cake, but he declines because of the couple's age and immaturity. If that couple were heterosexual and brought a complaint under CADA, it would not constitute a violation of CADA. However, if that same couple were homosexual, is there any doubt that the Commission would proceed against the baker with vigor for discrimination based on sexual orientation?

> If the U.S. Supreme Court forces same-sex marriage on the states ... **the legal system will be employed to squash resistance to the new order**. **Lawyers** who oppose this not-so-brave new world will begin to lose their right to practice law for violation of the new so-called "ethics" of the profession.... [A]ll **physicians** who stand up for Christian morality to be stripped of their hospital privileges and medical licenses[16].... [T]his new right is said by these advocates to be so deeply embedded in the Constitution that it **trumps the First Amendment's guarantees** of freedom of speech, freedom of religion, and freedom of association. And it empowers government to run aspects of our lives that it has no business controlling. [J. Mark Brewer, "Refusing to Bow at the Altar of Homosexuality," cnsnews.com (June 15, 2015) (emphasis added).]

The case now before the Court will determine whether this lawyer's fearsome prediction will come

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[16] Confirming this prediction as to physicians, after nearly 30 years of practice, a well-respected Boston urologist, Paul Church, M.D., recently was expelled from the medical staff of four hospitals and an independent urology clinic solely because he voiced concerns about the unhealthy nature of homosexual behavior and objected to the hospital's aggressive promotion of "gay pride" activities. *See* P. Baklinski, "Leading U.S. hospital fires doctor for raising concerns about health risks of gay sex," Lifesitenews.com (June 25, 2015) and Dr. Paul Church speech "The great lies and the cost of telling the truth," MassResistance (video) (Apr. 9, 2017).

true in Colorado and elsewhere in the United States. However, the Declaration of Independence makes clear that the right to liberty and the pursuit of happiness were not given by government, and thus they cannot properly be taken away by any government. They cannot be trampled upon by a law that requires, *inter alia*, a Christian businessman to choose between abandoning his moral and religious principles in order to celebrate a same-sex marriage or closing down his business and giving up his livelihood.[17] As Petitioners explained, if this were not bad enough:

> the Commission also ordered Phillips to **reeducate** his remaining staff, nearly all of whom are his family members, by essentially **teaching them that he was wrong to operate his business according to his faith**. Moreover, the Commission imposed **intrusive reporting requirements** that force Phillips to give a running tally to the government detailing how he exercises his artistic discretion. [Pet. Br. at 2 (emphasis added).]

This case confirms the observation of pro-same-sex marriage libertarian John Stossel that the gay marriage movement "has moved from tolerance to totalitarianism."[18] An occupation is an individual's

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[17] Holy writ gives guidance to those compelled to make such a choice: "We ought to obey God rather than men." Acts 5:29.

[18] J. Poor, "Stossel: Gay Marriage Movement 'Has Moved from Tolerance to Totalitarianism,'" Breitbart (Apr. 2, 2015)

means to acquire property and must be protected by a free state.

> A free society cannot exist unless government is prohibited from confiscating private property. If government can seize something owned by a private citizen, it can exert enormous power over people. One would be reluctant to speak, write, pray, or petition in a manner displeasing to the authorities lest he lose what he has already earned and possesses. [B.H. Siegan, Economic Liberties and the Constitution (U. Chicago Press: 1980) at 83.]

The practical effect of CADA is that any person in Colorado is empowered to target Christian businesses for extinction.[19] All that is required is that a demand be made of a business to participate in the celebration of a homosexual wedding, followed by a refusal, and the filing of a complaint. At that point, the state takes over to do the dirty work of enjoining and fashioning a remedial order to "re-educate" the employees of the business, and if the business chooses not to capitulate

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http://www.breitbart.com/video/2015/04/02/stossel-gay-marriage-movement-has-moved-from-tolerance-to-totalitarianism/.

[19] *See, e.g.*, B. Payton, "Ultra-Rich Gay Activist On Targeting Christians: It's time to 'Punish the Wicked,'" The Federalist (July 19, 2017) ("tech millionaire turned LGBTQ Activist ... said he's aiming to punish Christians who don't want to participate in same-sex weddings."); T. O'Neil, "Ohio LGBT Group Announces Plans to Target Churches for Homosexual Weddings," PJ Media (Feb. 23, 2017).

to the spirit of an age marked by hostility and immorality,[20] it can be put out of business.[21] One hundred years ago, it was observed that: "If a government acts in accordance with the Bible, it will always be doing the right thing. If it transgresses the bounds that the Bible has placed around it, it becomes tyrannical." John Clover Monsma, What Calvinism Has Done for America (Rand McNally: 1919) at 141.

D. The Colorado Commission Operates in a Highly Politicized Environment.

It is no secret that Colorado's Governor Hickenlooper is an enthusiastic supporter of all manner of "homosexual rights."[22] He exhibits enormous personal control over the machinery which has ruled against Masterpiece Cakeshop. In his capacity as Governor, Hickenlooper appoints the Executive Director of the Colorado Department of Regulatory Agencies[23] who, in turn, appoints the

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[20] *See* Ephesians 2:1-3; Romans 1:24-32.

[21] Tellingly, in most, but not all instances, the person bringing the charges is a person engaged in behavior which violates Biblical standards, and the person against whom charges are brought has chosen to live by those Biblical standards.

[22] *See* http://blogs.denverpost.com/thespot/2012/05/09/john-hickenloopers-support-gay-rights/70644/.

[23] *See* https://www.colorado.gov/governor/news/joe-neguse-named-executive-director-department-regulatory-agencies.

Director of Colorado's Division of Civil Rights.[24] All of the critical proceedings against businesses for discrimination are handled by this administrative agency, not requiring involvement of the Colorado Attorney General (JA 335) or the courts. Pursuant to C.R.S. 24-34-306, an aggrieved party may file a complaint with the Civil Rights division and, after the defending party is given opportunity for rebuttal, the director of the Civil Rights division determines whether there is probable cause of unlawful discrimination. JA 69-77. If so, the director has the authority to force the parties to engage in "compulsory mediation." If such mediation proves unsuccessful (such as when the defendant refuses to comply), the director "serves" a notice and complaint "requiring the respondent to answer the charges at a formal hearing before the commission, a commissioner, or an administrative law judge." C.R.S. 24-34-306(4). JA 87. Only after all administrative proceedings and appeals have been heard and a remedial order issues may an aggrieved party "obtain judicial review."

Under this administrative system, before an order is entered, there is no recourse to the judiciary and no right to trial by jury before injunctive relief and orders to re-educate employees are imposed — only administrative proceedings followed by deferential appellate review.[25]

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[24] *See* https://www.colorado.gov/pacific/dora/Aubrey-Elenis-appointed-CCRD-Director.

[25] Commission findings of fact are conclusive if supported by substantial evidence. C.R.S. 24-34-307(6).

Once the outcome of such administrative proceedings becomes predictable, and particularly where the state does the work for the complainant, it encourages the targeting of Christian businesses by homosexual activists for destruction.[26]

E. CADA Seeks to Implement an Irreligious Totalitarian Agenda under the Guise of Secularism.

It would be a grave mistake for this Court to believe that placing such power in the hands of the state, to be exercised at the request of individuals, was a religiously neutral act, designed to defend the supposedly oppressed against supposed discrimination and persecution by Christian businesses. Noted historian, journalist, and author, Professor M. Stanton Evans, a lifelong student of the American political system, explained the problem as follows:

> In the secularist or materialist view of life, it is imagined that there is such a thing as a political order that is *not* based on religious axioms, and it is this **nonreligious order** that is allegedly being defended against the intrusion of Christian zealots.... [However] what goes by the name of **secularism** is in fact **a substitute form of religious faith**.

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[26] C.R.S. 24.2-34-602 also authorizes the imposition of fines and imprisonment, but only in a proceeding before a civil or criminal court, not the administrative proceeding.

> [M.S. Evans, The Theme is Freedom (Regnery: 1994) at 119-20 (emphasis added).][27]

In truth, CADA protects a hotbed of what Evans described as neopagan ideologies and practices of the sort embraced by Rousseau, Hegel, Engels, and Nietzsche, and is emblematic of the type of laws enacted by a totalitarian society:

> When religious value is ... reasserted in the secular order, dominion over every facet of life converges in a single center; **the political regime becomes both church and state, and claims authority over faith and conscience**. It is this crushing, all-pervasive assertion of power over every aspect of existence, without exception or reserve, that is the truly **distinguishing feature of the totalitarian movements. It is what makes totalitarianism "total."** [*Id.* at 121 (emphasis added).]

State efforts to compel matters of opinion do not end well. As Justice Jackson explained: "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged.... As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be... Ultimate futility ... is the

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[27] This principle has been advanced by many scholars. *See also* Herbert Schlossberg, Idols for Destruction: The Conflict of Christian Faith and American Culture (Crossway Books: 1990) at 6.

lesson of every such effort...." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 640-41 (1943).

Should this Court agree that the State of Colorado is barred from managing the conduct of the business of Masterpiece Cakeshop, that ruling should be based on principles that are generally applicable to all, not limited to artists. *See* Section II, *infra*. Only in this way can this Court implement its promise made by the five-judge majority in Obergefell that:

> The **First Amendment** ensures that religious organizations and persons are given proper **protection** as they seek to teach the **principles** that are so fulfilling and so central to their **lives and faiths**, and to their own deep aspirations to continue the family structure they have long revered. [Obergefell at 2607 (emphasis added).]

F. There Must Be No Special Rules for First Amendment Cases involving Same-Sex Marriage.

In a trio of opinions, resting on shaky reasoning and girded by little more than "social science" studies,[28] this Court has continually chosen to advance the homosexual agenda at the cost of traditional values, Christian beliefs, and constitutional fidelity.

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[28] Such "evidence" is often not subjected to cross examination and in many cases is submitted to courts for the first time on appeal.

In Lawrence v. Texas, 539 U.S. 558 (2003), Justice Scalia noted in dissent that the Court has "largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct." *Id.* at 602. Indeed, in Lawrence, the Court abandoned the traditional common law rule against sodomy to "find" a constitutional right to homosexual sodomy as part of a so-called "right to privacy," in turn a so-called "penumbra" of other constitutional provisions. *Id.* at 595. Prior to Lawrence, the Court insisted that there be evidence of a common law right before the Due Process Clause could be used to protect such a right. *See* Washington v. Glucksberg, 521 U.S. 702, 705, 710-11 (1997).

Then, in United States v. Windsor, 133 S.Ct. 2675 (2013), the Court accused the United States Congress of discrimination and animus. Further eroding the common law as a fixed standard by which nontextual constitutional claims must be measured, the Court found that the Defense of Marriage Act's definition of marriage to "hav[e] the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." *Id.* at 2693.

Finally, in Obergefell v. Hodges, the Court manufactured a constitutional right to homosexual

marriage, and threw to the wind not only common law principles but worldwide norms honored for time out of mind. Instead, the Court perceived "shift[s] in public attitudes" about (i) the important and fundamental nature of marriage, and (ii) the lack of sufficient justifications for not granting homosexuals their demands. *Id.* at 2596.

Indeed, in all three of these cases brought against state and federal governments, it appears that this Court's decisions rested upon the assumption that the Court on the one hand believed that homosexual sodomy and gay marriage were vitally important to homosexuals, but on the other hand did not believe that prohibiting such unions was all that important to the state or to society in general. *See, e.g.*, Obergefell at 2599-2600, 2606-7.

This case, however, is of an entirely different nature. It does not involve the power of a government to regulate homosexual conduct. It involves the power of homosexuals to regulate the business conduct of those who disagree with their behavior. It involves the authority of decent people to carry on their occupation without being forced to celebrate the homosexual lifestyle. This Court can no longer claim that society has only some vague interest in upholding its laws — rather, a very real baker has a clear and vital interest in the decision as to whether he will be able to continue his profession, or must close his doors forever. On the other side of the coin is the interest of a confrontational and intolerant homosexual couple, who would prefer to use the power of the state to force their lifestyle choices upon others, rather than simply walk

down the street to find another bakery willing to serve their behaviors. In fact, the homosexual couple in this case had no problem acquiring a cake just like the one they sought from Masterpiece. *See* Pet. Br. at 10.

G. CADA Is Based upon a Perversion of the Common Law Doctrine of Public Accommodations.

CADA employs the common law term "place of public accommodation," yet expands the definition of that term so that it has no relation whatsoever to the common law principle. Under CADA, that term includes:

> **any place of business** engaged in **any sales to the public** and any place **offering services, facilities, privileges, advantages, or accommodations** to the public, including but not limited to any business offering **wholesale or retail** sales to the public; any place to **eat, drink, sleep, or rest,** or any combination thereof; any **sporting or recreational** area and facility; any **public transportation** facility; a **barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment** conducted to serve the health, appearance, or physical condition of a person; a **campsite or trailer camp**; a dispensary, clinic, hospital, convalescent home, or other **institution for the sick,** ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an **educational institution**; or any

> **public building**, park, arena, theater, hall, auditorium, museum, library, exhibit, or **public facility of any kind** whether indoor or outdoor. [C.R.S. 24-34-601 (1) (emphasis added).]

This definition turns the common law protection of liberty of contract on its head, consigning that freedom to exceptional status rather than the general rule protecting freedom in the marketplace of goods and services. Even the U.S. Civil Rights Act of 1964[29] left intact areas of freedom that are closed by CADA.[30]

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[29] Contrast CADA with Title II of the Civil Rights Act of 1964, which applies to a narrow class of businesses:

> (1) any **inn, hotel, motel**, or other establishment which provides lodging to transient guests...; (2) any **restaurant, cafeteria, lunchroom, lunch counter, soda fountain**, or other facility principally engaged in selling food for consumption on the premises...; (3) any **motion picture house, theater, concert hall, sports arena, stadium** or other place of exhibition or entertainment; and (4) any establishment (A)(i) which is **physically located** within the premises of any establishment otherwise covered by this subsection.... [42 U.S.C. §2000a(b) (emphasis added).]

[30] Unlike the Colorado law, Title II only applies to "discrimination on the ground of race, color, religion, or national origin," and that law neither originally nor in the half-century since its enactment, has included either "sex" or "sexual orientation." Even so limited, 21 Democrat Senators and 6 Republican Senators voted against final passage of the 1964 Civil Rights Act, including J. William Fulbright (D-AK), Russell Long (D-LA), Robert Byrd (D-WV), and Albert Gore (D-TN). Interestingly, Barry Goldwater (R-AZ) felt compelled to vote against the 1964 Civil Rights Act because he believed that Titles II and VII were unconstitutional, reportedly

The common law rule of public accommodation has always recognized that there was a special, **narrow** class of businesses on which were imposed the unusual requirement to serve all comers — a rule which never applied to the vast majority of businesses. Cornell Law Professor John E.H. Sherry, noted for the standard reference text in hospitality law, The Law of Innkeepers, explains that the doctrine imposed special duties on innkeepers at a time when traveling was difficult, and the danger of attack by outlaws and robbers increased considerably at night. J.E.H. Sherry, The Laws of Innkeepers — For Hotels, Motels, Restaurants, and Clubs, 3rd ed. (Cornell U. Press: 1993), at 4. "The **innkeeper** has, from the earliest time, been recognized as being engaged in a **public employment** and, therefore, as subject to the duty of one engaged in such employment." *Id.* at 38-39. Another law professor, Bruce Wyman, describes the origin of the duty to serve all, as follows:

> When the weary traveller reaches the wayside inn in the gathering dusk, if the host turns him away what shall he do? Go on to the next inn? It is miles away, and the roads are infested with robbers. The traveller would be at the mercy of the innkeeper, who might practise upon him any extortion, for the guest would submit to anything almost, rather than be put out into the night. Truly a **special law**

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in part based on "advice from two young legal advisors, William Rehnquist and Robert Bork." William Voegeli, "Civil Rights and the Conservative Movement," Claremont Review of Books, vol. VIII, No. 3 (Summer 2008).

> is required to meet this situation, for the traveller is so in the hands of the innkeeper that only an **affirmative law** can protect him. [B. Wyman, The Law of the Public Callings as a Solution of the Trust Problem, 17 Harv. L. Rev. 136, 159 (1903) (emphasis added).]

In clear terms, Professor Wyman highlighted the duty of the innkeeper as being distinct from the operation of all other businesses: "The **innkeeper** is in a **common calling** under severe penalty if he do not serve all that apply, while the ordinary **shopkeeper** is in a **private calling free to refuse to sell** if he is so minded." *Id.* (emphasis added).

Professor Sherry explained that the decision to enter one of the businesses of common calling, and the assumption of the duties of those professions, was a choice and could not be compelled. Only if an individual chooses a common calling, however, would his business have "a duty to serve every person as a member of the public [and at] a reasonable price...." Sherry at 38. Thus, it can be clearly seen that CADA conflated the common calling of true places of public accommodation with places of private calling, imposing a duty to serve the public that is completely unsupported by the common law doctrine of public accommodation.[31]

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[31] There is no ethical doctrine of public accommodations in the ABA Model Rules of Professional Conduct and no requirement that lawyers must agree to represent all clients who may want to engage them. Although lawyers have a general duty to provide legal services to those unable to pay (ABA Model Rule 6.1), that

Contrast the common law doctrine of public accommodations with CADA as applied here. The common law doctrine was borne of necessity; CADA of desire. The common law doctrine involves public safety; CADA conformity of belief. The common law doctrine was limited; CADA is virtually without limit, driven by the political power of a self-identified group. *See* Pet. Br. at 10. Labeling CADA a public accommodations law should be seen as an effort to obscure the true nature of that law, which is designed to compel and coerce participation by private persons in behavior that they may view to be sinful, immoral, distasteful, and harmful.

H. The Thirteenth Amendment Prohibits Not Just Slavery, but also Involuntary Servitude.

Although there appear to be no cases in which this Court has invalidated a state law based on the Thirteenth Amendment, in The Civil Rights Cases, 109 U.S. 3 (1883), the Court observed "the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Id.* at 20.

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rule is not implemented by the compulsory provision of professional services. Indeed, ABA Model Rule 6.2 expressly states that a lawyer even may seek to avoid appointment by a tribunal to represent a "client or ... cause ... repugnant to the lawyer...."

The only modern case discussing both the doctrine of public accommodations and the Thirteenth Amendment was Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964). The Court principally addressed a Fifth Amendment Due Process challenge to Title II of the Civil Rights Act of 1964 as a valid exercise of the congressional power to regulate commerce. In rejecting a secondary claim based on the Thirteenth Amendment, Justice Tom Clark listed existing state laws that "prohibit racial discrimination in public accommodations," observing that:

> [t]hese laws but **codify the common-law innkeeper rule** which long predated the Thirteenth Amendment. It is difficult to believe that the [Thirteenth] Amendment was intended to abrogate this principle.[32] [*Id.* at 261 (emphasis added).]

Although Justice Clark was undoubtedly correct in his view that the Thirteenth Amendment was no bar to Title II, as it constituted no more than a modern application of the common-law innkeeper rule, nothing in Heart of Atlanta supports the proposition that the Thirteenth Amendment would be inapplicable to CADA, which forces service from not just common-law places of public accommodation, but from all types of

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[32] The Court also stated that such laws were noted with approval in the prior Supreme Court decision considering the constitutionality of a federal public accommodations law, Civil Rights Cases, 109 U.S. 3 (1883), where the court ruled narrowly that the law was not authorized by the Fourteenth Amendment, and did not discuss the objections to such a law discussed herein.

businesses. In addition to abolishing slavery in the United States, the Thirteenth Amendment expressly prohibits "involuntary servitude ... within the United States, or any place subject to their jurisdiction." In the circumstance where a cake maker would, of his own volition, choose not to bake a cake for a customer, and indeed refuses to do so, a law that compels and coerces him to provide that service to a customer on an involuntary basis could easily be said to fall within the very definition of "involuntary servitude."

II. THE COURT OF APPEALS' DECISION VIOLATES MASTERPIECE'S AND PHILLIPS' FREE EXERCISE OF RELIGION.

A. Masterpiece's Free Exercise Claim Is not Foreclosed by a finding that CADA Is a Neutral Law of General Applicability.

It is undisputed that Phillips (i) would make the same-sex couple "'birthday cakes, shower cakes, [and] sell [them] cookies and brownies,'" but (ii) would not make "cakes for same-sex weddings." Pet. Br. at 11. With respect to Masterpiece's Free Exercise claim, the ALJ erroneously assumed that this distinction made no difference because the Commission had jurisdiction over Masterpiece's production and sale of all its bakery under a religiously neutral law of general applicability. The Court of Appeals agreed, finding that "CADA is a neutral law of general applicability" under Emp't Div., Dept. of Human Res. v. Smith, 494 U.S. 872 (1990). On that basis alone, the Court of Appeals concluded there was no violation of Masterpiece's or Phillips' free exercise of religion. *See* Pet. Br. at 13-14.

In their brief, Petitioners have asserted that, as **applied,** the Commission acted neither neutrally, nor generally, but "has applied CADA to target Phillips's religious beliefs for adverse treatment." *See* Pet. Br. at 39. While the Petitioners have marshaled convincing evidence in support of a Free Exercise claim based on Commission partiality and prejudice against Masterpiece (*id.* at 39-44), they need not prevail on that ground to succeed on their Free Exercise claim. Whether their claim is based on Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (*id.* at 42-45) or on the "hybrid rights" theory identified in Smith (*id.* at 46-48), Petitioners have placed their Free Exercise claim into the hands of this Court, urging it to apply "strict scrutiny" to determine whether Colorado's anti-discrimination interests outweighs Petitioners' exercise of religion. *See id.* at 48-61.

But the question of Free Exercise is more straightforward and more principled than to empower this Court to balance interests — a task already performed by the People when they ratified the Constitution. *See* District of Columbia v. Heller, 554 U.S. 570, 634-35 (2008). As Chief Justice John Marshall put it in Marbury v. Madison:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.... The principles ... so established ... are ... permanent [and so as] not [to] be

> mistaken, or forgotten, the constitution is written.... [Marbury v. Madison, 5 U.S. 137, 176 (1803).]

Applying this principle of the permanence of the original text, any inquiry concerning whether an act is an "exercise of religion" which cannot be prohibited must begin with the definition of the key term in this provision: **"religion."**

B. Religion Is a Jurisdictional Term Prohibiting the State from Regulating Activities that Belong to the Church.

As this Court explained in Reynolds v. United States, 98 U.S. 145 (1878), "'religion' is not defined in the Constitution." *Id.* at 162. But that fact did not mean that the Reynolds Court was free to define religion in any way that suited it. Rather, the Court resorted to the history of the development of the freedoms of religion in Virginia, the documents of which coincided most closely to the First Amendment text. *Id.* at 163. Reciting James Madison's Memorial and Remonstrance's reference to Article I, Section 16 of the 1776 Virginia Constitution, the Reynolds Court concluded the "free exercise of religion" to mean "'the duty we owe the Creator' [that] was not within the cognizance of civil government." *Id.* Then, scouring Thomas Jefferson's Virginia Statute for Establishing Religious Freedom, the Reynolds Court found that "religion" embraced that same jurisdictional principle: "the true distinction between what properly belongs to the church and what to the State." *Id.*

For decades after Reynolds, this jurisdictional principle lay largely dormant until Justice Scalia wrote the majority opinion in Smith, in which he summarized a number of Free Exercise cases, drawing out of them a unifying principle "that an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct **that the State is free to regulate**." Smith at 878-79 (emphasis added). Even though Justice Scalia inventoried a number of precedents to illustrate this jurisdictional principle, and even though he listed a number of activities outside the jurisdiction of the state (*id.* at 878-79), the Smith jurisdictional test has been largely ignored[33] — until just five years ago in the unanimous decision of this Court in Hosanna Tabor Lutheran Church v. EEOC, 565 U.S. 171 (2012).

In Hosanna-Tabor, the EEOC sought to enforce the Americans with Disabilities Act ("ADA"), a neutral and generally applicable law. Yet, that did not deter this Court from finding the application of the law to the employment conditions of a church school employee to be outside the jurisdiction of the EEOC. *See id.* at 183-89. It traced this "ministerial exception" back to James Madison's jurisdictional meaning of "religion," just as the Reynolds Court had done in the late 19th century. *Id.* at 184-85. The EEOC responded, asserting that Smith "precludes recognition of a ministerial exception [because] ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability."

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[33] *See* H. Titus, "The Free Exercise Clause: Past, Present and Future," 7, 25-35 REGENT L. REV. (1995).

Hosanna-Tabor at 189-190. This Court rejected that claim, asserting that "[t]he contention that Smith forecloses recognition of a ministerial exception rooted in the Religion Clauses has no merit." *Id.* at 190.

Applying the teaching in Hosanna-Tabor here, one cannot answer the question whether Masterpiece's Free Exercise Claim is defeated solely because the Colorado law banning discrimination in public accommodations is a neutral law of general applicability. Courts must now first ascertain whether the conduct outlawed falls within the category of the "exercise of religion" and therefore outside the jurisdiction of the state. *See id.* at 189-90. As it was in Smith, before addressing whether the Oregon law was neutral and generally applicable, Justice Scalia itemized a number of such jurisdictionally out-of-bound categories, beginning with "belief and profession" of belief and extending to "proselytizing [and] abstaining from certain foods or certain modes of transportation." *Id.* at 877. If a law were applied to any of these categories of conduct, then no regulation of such conduct would be permitted even if neutral and of general applicability. *See* Hosanna-Tabor at 185-86.

C. The State Is not Free to Regulate Proselytizing.

Although the Court of Appeals below acknowledged that the free exercise guarantee precludes the state from taking jurisdiction over "'belie[f] and profes[sion] [of] whatever doctrine one desires,'" and even from the "'performance of (or abstention from) physical acts,'" the Court below

utterly failed to apply this threshold jurisdictional test to Phillips' decision to abstain from baking a cake for a wedding ceremony which, by its nature, is a proselytizing event.[34] Indeed, as the Petitioners have established in their opening brief, a Masterpiece wedding cake is not the subject of an ordinary sale of a Phillips "premade baked item which he sells to everyone, no questions asked." Pet. Br. at 9. Instead, each wedding cake that Phillips produces is designed to play a key role in a "celebratory" event symbolizing the Biblical teaching that unites one man and one woman into one flesh. *See* Pet. Br. at 6-9. Thus, for Phillips to have made a cake as requested by two "gay men," he would have had to deny his faith. In contrast, the sale of a tray of brownies would not. As Justice Alito has recently observed, "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within ... the 'exercise of religion' [which] involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'" Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2770 (2014).

D. A Wedding Ceremony Is a Proselytizing Event Outside the Jurisdiction of the State.

In Obergefell v. Hodges, 135 S.Ct. 2584 (2015), this Court observed that: "**The nature of marriage** is that, through its **enduring bond**, two persons

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[34] Proselytize - to convert from one religion, belief, opinion, or party to another. Webster's Third International Dictionary 1821.

together can find other freedoms, such as **expression, intimacy, and spirituality**." *Id.* at 2599 (emphasis added). Although a marriage may be a private matter before a justice of the peace, a wedding ceremony, according to the Obergefell Court, is a public profession, a proselytizing celebration, "transcendent," "sacred," "unique" "[r]ising from the most basic human needs ... essential to our most profound hopes and aspirations." Obergefell at 2594. Thus, the Obergefell majority celebrates:

> Choices about marriage shape an individual's destiny ... because '[marriage] fulfils yearnings for security, safe haven, and connection that **express our common humanity,** ... an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition.' [Obergefell at 2599 (emphasis added).]

In sum, Masterpiece's categorical commercial distinction between selling brownies and cupcakes to a same-sex couple but refusing to fashion a wedding cake in celebration of the union of that same-sex couple is predicated on the ground that the brownie exchange is an **ordinary business transaction**, while the wedding cake celebrates a **proselytizing event** expressing "the highest ideals of love, fidelity, devotion, sacrifice, and family." *See* Obergefell at 2608. As Justice Kennedy observed in Obergefell:

> The First Amendment ensures that religious ... persons are given proper protection as they seek to teach the principles that are so

> fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. [Obergefell at 2607.]

But here, the Court of Appeals and the ALJ understood the celebratory and ceremonial nature of a wedding and affirmed the Commission's order that Phillips "retrain[] his staff [and] change his business policies" to conform to the state's anti-discriminatory policies, including "requir[ing] the creation of **wedding cakes celebrating same-sex marriages**." Appellants' Opening Brief, Masterpiece v. Craig, Colo. Ct. of App., No. 2014CA1351, at 5 (emphasis added). If Phillips is required to undergo retraining calculated to condone a "family structure" diametrically opposed to the one that he "reveres," and if Phillips is required additionally to have his business help "celebrate" a marriage ceremony contrary to a "central" tenet of his faith, as the Court of Appeals deems permissible, then the Obergefell promise of freedom of religion will become nothing but a mockery.

III. THE COURT OF APPEALS' DECISION ERRONEOUSLY APPLIED THE SUPREME COURT'S "COMPELLED" SPEECH DOCTRINE.

The Court of Appeals relied solely upon the Supreme Court's "compelled speech" doctrine, concluding that, because a wedding cake is not "inherently expressive," there was no violation of Masterpiece's First Amendment rights. *See* Pet. Br. at 12-13. That conclusion, in turn, was based upon the

Court's opinion that, whatever message might be proclaimed in a wedding cake without words, the burden was upon Masterpiece to demonstrate that "a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage...." *Id.* at 13.

But Masterpiece's First Amendment rights are not dependent upon what a third party, reasonable or otherwise, would infer. Rather, those rights are determined by the First Amendment's jurisdictional principle that bars the Colorado Civil Rights Commission from discriminating against a person who holds a viewpoint different than that which prevails on the Commission. There is ample evidence that the Commission has engaged, and will continue to engage, in viewpoint discrimination against Masterpiece and Phillips because of their contrary views. *See* Pet. Br. at 36-37. Viewpoint discrimination is a *per se* violation of the First Amendment. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995); Lamb's Chapel v. Central Moriches Union Free School Dist., 508 U.S. 384 (1993). Once viewpoint discrimination has been established, then a court need not make any further inquiry. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106-07 (2001).

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the Colorado Court of Appeals and declare the Commission order to be unconstitutional and void.

Respectfully submitted,

JOSEPH W. MILLER
U.S. Justice Foundation
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for Amicus Curiae U.S. Justice Foundation

MICHAEL BOOS
Citizens United
1006 Penn. Ave. SE
Washington, DC 20003
Attorney for Amici Curiae Citizens United and Citizens United Found.

JAMES N. CLYMER
CLYMER CONRAD, P.C.
408 West Chestnut St.
Lancaster, PA 17603
Attorney for Amicus Curiae Conservative Legal Defense and Education Fund

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae
**Counsel of Record*

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